No. 85-1259

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Seventh Amendment guarantees a right to a jury trial in an action brought by the United States under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, seeking injunctive relief, restoration of filled wetlands, and civil penalties.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-25a) is reported at 769 F.2d 182. The opinion of the district court (Pet. App. 30a-63a) is reported at 615 F. Supp. 610.

JURISDICTION

The decision of the court of appeals was entered on July 30, 1985. A petition for rehearing was denied on October 30, 1985 (Pet. App. 26a-27a), and November 4, 1985 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on January 24, 1986, and was granted on May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

33 U.S.C. 1319 provides in relevant part:

> **(b) Civil actions.** The Administrator [of the Environmental Protection Agency] is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.
>
> * * * * *
>
> **(d) Civil penalties.** Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

STATEMENT

1. a. Although the sovereign's power to prevent the obstruction of navigable waterways has long existed in English and American law (see pages 18-24, *infra*), it was not until 1890 that Congress created a statutory prohibition to facilitate the exercise of that power. Section 10 of the Rivers and Harbors Appropriations Act of 1890 (the Act), prohibited the creation of any obstruction to the navigable capacity of any waters "not affirmatively authorized by law," and authorized the imposition of criminal penalties for violations of its prohibitions. In addition, the Attorney General was authorized to institute "proper proceedings in equity" to seek removal of the obstruction (26 Stat. 454). See generally *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 709 (1899). In 1899, the entire Rivers and Harbors Appropriations Act of 1890 was reenacted with minor modifications. See *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 656-657 (1973). The authority of the Attorney General to seek removal of unlawful obstructions was retained in Section 12 of the Act, 33 U.S.C. 406.[1]

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[1] Section 12, 33 U.S.C. 406, provides in pertinent part as follows:

> [T]he removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such

As amended in 1899, Section 10 of the Act, 33 U.S.C. 403, generally forbids the placing of fill into or otherwise obstructing navigable waters "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." The Act has been held to prohibit both obstructions to navigation (see *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251 (1915)), and (in Section 13, 33 U.S.C. 407) the pollution of the Nation's waters (see *United States* v. *Pennsylvania Industrial Chemical Corp.*, *supra*), except under conditions approved by the Army Corps of Engineers.

b. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)).[2] In Section 301(a) of the CWA, 33 U.S.C. 1311(a), Congress enacted an absolute prohibition against the discharge of pollutants into navigable waters, excepting only discharges made in compliance with other sections of the CWA. Any violation of Section 301 of the CWA may be challenged in district court by the Environmental Protection Agency (EPA) under Section 309(b), 33 U.S.C. 1319(b), which authorizes the court to award "appropriate relief, including a permanent or temporary injunction * * *." Section 309(d), 33 U.S.C. 1319(d), subjects

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structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

[2] The statute originally was named the Federal Water Pollution Control Act. Congress changed the name of the statute in 1977. 33 U.S.C. 1251 note. For convenience, we shall refer to the statute by its new name throughout this brief.

a violator to civil penalties of up to $10,000 per day for each violation.[3]

Pursuant to Section 404 of the CWA, 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program to regulate the discharge of dredged or fill material into "navigable waters." The statute defines "navigable waters" as "waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)). Pursuant to regulations published in 1977,[4] the Corps' jurisdiction under Section 404 extends to certain "wetlands," which are defined to include: "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. 323.2(c).

Prior to issuance of a Section 404 permit, the Corps determines not only the extent of the wetlands on the property to be filled, but also the environmental effect of the proposed filling on those wetlands. These determinations are made by applying guidelines de-

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[3] Section 309(c) of the CWA, 33 U.S.C. 1319(c), authorizes the imposition of criminal penalties for willful or negligent violations of the CWA.

[4] The Corps' current definition of "waters of the United States," including "wetlands," is a reworded but substantively unchanged version of the definition promulgated in 1977. The 1977 definition was amended in 1982 to make it identical to EPA's definition of the same phrase (40 C.F.R. 122.2). See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 2. Thus, the two agencies define "waters of the United States"—and hence the scope of federal regulatory jurisdiction—in the same way for all Clean Water Act programs.

veloped by the Administrator of the EPA in conjunction with the Secretary of the Army. Section 404(b), 33 U.S.C. 1344(b). See generally 40 C.F.R. Pt. 230. The resulting permit decision is thus supported by an administrative record (see generally 33 C.F.R. 325.2(a)(6)), and is subject to review in a district court pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 905 (5th Cir. 1983) (collecting cases).

2. Petitioner is engaged in the business of filling and developing residential resort properties on the island of Chincoteague, Virginia (Pet. App. 2a).[5] Four of these properties are the subject of this litigation—the Ocean Breezes subdivision (consisting of the Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Sections B and C), the Mire Pond Camper sites (Mire Pond I and II), Eel Creek, and Fowling Gut Extended.

Beginning in 1975, petitioner developed the Ocean Breezes subdivision as a mobile home site (Pet. App.

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[5] Petitioner repeatedly has been sued for violating the Clean Water and Rivers and Harbors Acts in his commercial activity on Chincoteague Island. In 1975, the United States unsuccessfully sought to prevent petitioner from filling areas behind a bulkhead in a development known as the Inlet View Campground (C.A. App. 1374-1380). In 1985, the United States successfully prosecuted petitioner for the construction of a 296-foot oyster shell road in a wetlands area. *United States* v. *Tull*, Civ. No. 84-186-N (E.D. Va. June 26, 1985), appeal pending, Nos. 85-2041(L) and 85-2249 (4th Cir.). In 1986, petitioner was successfully prosecuted for filling wetlands in an area known as Ocean Breeze Section D, and for blocking tidal channels in an effort to dry out wetlands in the same area. *United States* v. *Tull*, Civ. No. 85-649-N (E.D. Va. May 15, 1986), appeal pending, No. 86-3067 (4th Cir.).

4a). Development of the area required the placing of approximately 20,000 cubic yards of fill, mostly sand, at the site (*id.* at 39a). Petitioner developed the Mire Pond Camper Sites beginning in 1978 (*id.* at 4a, 39a). That development required the placing of fill to a depth of approximately three feet (*ibid.*). Fowling Gut Extended, a 40-foot-wide canal (*id.* at 48a), was filled by petitioner beginning in 1976 (*id.* at 4a, 50a). Fill was placed on the Eel Creek site in 1980 (*id.* at 4a). Petitioner did not apply for either a Section 10 or Section 404 permit from the Corps for any of this filling (Pet. App. 4a).

On July 1, 1981, the United States filed a complaint against petitioner, charging him with violations of the Clean Water Act. As amended on October 5, 1982 (Pet. App. 67a-73a), to include a charge that he violated the Rivers and Harbors Act, the complaint alleged that petitioner had discharged pollutants into waters of the United States, without a permit from the Corps of Engineers, in violation of 33 U.S.C. 403, 1311(a) and 1344 (Pet. App. 69a-70a). The complaint alleged that the fill had been discharged into wetlands at the Ocean Breezes subdivision (*id.* at 68a), the Mire Pond Camper Sites (*id.* at 69a), the Eel Creek site (*id.* at 70a), and into additional wetlands owned or controlled by petitioner (*id.* at 71a). The United States sought an order enjoining petitioner from committing further violations, directing removal of fill and restoration of affected areas, assessing civil penalties in accordance with Section 309(d) of the CWA, and granting "such other relief as the Court may deem just and proper" (Pet. App. 72a). In an order issued on September 9, 1981 (J.A. 80-81), the court denied petitioner's request for a jury trial, finding the relief requested by

the United States to be "in every instance, equitable in nature * * *" (*id.* at 81).

A 15-day bench trial was held between July 27 and November 24, 1982.[6] Contrary to his current assertion (Br. 3), petitioner did not contest the allegation that he placed sand and other fill material onto the properties that were the subject of the complaint (Pet. App. 38a-39a), nor did he claim that he ever had applied for a permit from the Corps prior to the filling (*id.* at 54a). The trial thus was primarily concerned with petitioner's argument that the properties he filled were not wetlands subject to the jurisdiction of the Corps.[7] The district court heard the evidence of 26 witnesses, including 12 expert witnesses called by the United States and one expert called by the district judge himself.

In its opinion, the district court found "substantial, credible evidence" (Pet. App. 40a) that petitioner had filled wetlands at the Ocean Breezes, Mire Pond and Eel Creek sites (*id.* at 40a-46a). The court also found that Fowling Gut Extended "was navigable in fact and was utilized by boat traffic

[6] The district court rejected petitioner's arguments that the Clean Water Act and the regulations promulgated pursuant to that Act either effected a taking of his property or were unconstitutionally vague (Pet. App. 54a-55a). The court also rejected petitioner's claim that the government should be equitably estopped from enforcing the law against him (*id.* at 56a-57a). The court of appeals affirmed these holdings (*id.* at 6a-8a, 10a-12a), and these issues are not before this Court for review.

[7] As a question of regulatory and statutory interpretation (see *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 2), the issue whether the Corps had jurisdiction over petitioner's property as "adjacent wetlands" was decided by the court.

subsequent to 1963 and prior to the time when [petitioner] filled in this waterway without applying for or obtaining any permit from the Army Corps of Engineer[s]" (*id.* at 49a). Once having filled the canal, the court found, petitioner sold lots at the site "that were actually a filled navigable waterway" and "profited by his sale of [those] lots * * *" (*id.* at 50a). The court concluded that petitioner had shown "scant respect for the preservation of waters of the United States" (*id.* at 60a).

To remedy these violations, the district court assessed a civil penalty of $35,000 for the filling at Ocean Breezes (Pet. App. 60a), $35,000 for the filling at Mire Pond (*ibid.*), and $5,000 for the filling at Eel Creek (*ibid.*). Petitioner also was ordered to remove the fill that he had placed on five lots at Ocean Breeze Section C (*id.* at 61a), to convert two upland lots at Mire Pond II to wetlands (*ibid.*),[8] to restore all filled areas of Eel Creek to wetlands (*id.* at 62a), and to refrain from further filling activities without applying for a Corps of Engineers permit (*ibid.*). The court established the penalty for the filling of Fowling Gut Extended in the alternative: it directed petitioner either to pay a civil penalty of $250,000 or to "restore the extension of Fowling Gut to its former navigable condition * * *" (*id.* at 61a).

3. In affirming, the court of appeals rejected petitioner's claim that he erroneously had been denied his constitutional right to a trial by jury. Determining that the penalties the government sought "are within the district court's discretion" (Pet. App. 9a),

[8] These lots were to be converted to wetlands as compensation for the wetlands lots in Mire Pond I that are now filled and occupied by third parties.

the court explained that "the government is not suing to collect a penalty analogous to a remedy at law, but is asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine" (*ibid.*). Distinguishing the assessment of penalties from punitive damages actions at law, the court held that (*id.* at 9a-10a (footnote omitted))

> the assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of remedies, one part of the package affecting assessment of the others. This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence. In such circumstances, the seventh amendment is inapplicable.

SUMMARY OF ARGUMENT

This Court's test for the availability of a jury under the Seventh Amendment is well-settled: a party may demand a jury if the "rights and remedies" at issue in the suit are of the sort that were tried to a jury in common law courts in 1791. *Pernell* v. *Southall Realty*, 416 U.S. 363, 381 (1974). Under this analysis, a jury trial is constitutionally guaranteed only if both the remedy *and* the cause of action were treated as "legal" in nature by the English courts in 1791. If either the right or the remedy had been viewed as equitable, Chancery would have taken jurisdiction and a jury trial would have been unavailable. In this case, petitioner cannot prevail because both the cause of action pursued by the United States and the remedy awarded by the court are equitable in nature.

A. By far the closest historical analogue to the cause of action created by the Clean Water Act was

one to cure a "public" or "common" nuisance. In 1791, it was recognized that the sovereign could bring such an action to enjoin the obstruction of public waters or to abate offensive trades that polluted the environment. Both of these types of nuisance actions fell squarely within the jurisdiction of the courts of equity. See *Mugler* v. *Kansas*, 123 U.S. 623, 672-673 (1887); *United Steelworkers of America* v. *United States*, 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring). Because public nuisances were inherently of a continuing or recurring nature and affected large numbers of people, refusing equity jurisdiction in such cases would have made it necessary for many private plaintiffs to bring repeated suits for damages. And even a host of damage actions could not have fully protected the continuing interest of the public in, for example, the maintenance of a harbor unobstructed by illegal filling. In these circumstances, courts of law were seen as wholly inadequate to vindicate the public rights implicated in common nuisance actions.

Given the English precedents on this point, it is not surprising that recognition of the power of equity courts to enjoin public nuisances has been a "commonplace of jurisdiction in American judicial history." *Steelworkers*, 361 U.S. at 61 (Frankfurter, J., concurring). And this Court has expressly held that the Seventh Amendment has no application in such suits. *Mugler*, 123 U.S. at 673. Under the first prong of the Seventh Amendment test, then, petitioner cannot prevail.

B. While the equitable character of the Clean Water Act cause of action is enough to dispose of petitioner's claim, that claim also is foreclosed by the second prong of the Court's historical test: the *rem-*

edy available under the Act is equitable in nature. The injunctive relief sought by the government plainly was equitable. And the civil penalties made available under the Clean Water Act—which are awarded at the district court's discretion, and which in large part are designed to force a violator to disgorge improper profits—are of a sort traditionally viewed as equitable.

1. The civil penalties authorized by the Clean Water Act are not a fixed sum. To the contrary, those penalties are set at the discretion of the court, after the weighing of an array of equitable factors. In making penalties available, Congress endorsed the Environmental Protection Agency's penalty calculation policy. This policy looks first to the economic benefit that the violator obtained from violating the law. From there, the final penalty is determined by using a range of discretionary considerations to modify that amount: the environmental impact of the violation; the effect of the violation on the regulatory system; the state of mind of the violator; the violator's history of compliance with the Clean Water Act; and the violator's ability to pay. The discretion that infuses the court's assessment of penalties also is made manifest by the role of civil penalties as part of a package of equitable relief that may be awarded under the Act in a manner that provides the most efficacious and equitable remedy. This sort of discretionary calculation, turning on a balancing of statutory, policy, technical and particularized equitable factors, historically would have been performed by a court sitting in equity.

2. The *nature* of the factors taken into account by the court in setting a Clean Water Act civil penalty also demonstrates the equitable character of the pen-

alty remedy. Under the EPA penalty policy endorsed by Congress in 1977, the most important single criterion in setting a penalty is the economic benefit obtained by the polluter by virtue of his noncompliance with the statute. In their calculation and effect, civil penalties therefore are closely analogous to the classic equitable remedy of disgorgement. As such, they are integral parts of an equitable remedy that "differs greatly from * * * damages." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946).

3. Petitioner disregards these considerations in arguing that all actions to collect statutorily-created penalties are legal in nature. This contention fails to take account of the different types of money judgments rendered by the courts. An action to collect a statutory penalty may be analogous to a legal action for debt when—as in, for example, a contract action—the suit is for " 'a sum certain * * * due to the plaintiff, or a sum which can readily be reduced to a certainty.' " *United States* v. *Regan*, 232 U.S. 37, 41 (1914) (citation omitted). Virtually all of the cases cited by petitioner involved attempts to collect fixed penalties of that sort. But however analogous such penalties may be to debts at law, they differ fundamentally from penalties assessed under the Clean Water Act. Because the amount of a Clean Water Act penalty turns on an exercise of the judge's discretion—and involves an assessment of the seriousness of the offense, the efficacy of other forms of relief, and the like—it plainly is neither a "sum certain" nor "a sum which can readily be reduced to a certainty." Indeed, to the extent that Clean Water Act civil money penalties have an objectively-calculable component, it is measured by the violator's profit, an amount equivalent to "equitable" disgorgement rather than to "legal" debt.

C. Finally, even if the civil penalties at issue here somehow were deemed to be legal in nature, petitioner still would not be entitled to a jury trial. It has long been settled that where "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to * * * award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399. In both the public nuisance and other contexts, the Court accordingly has indicated that an equity court may award any remedy necessary to provide complete relief. Here, of course, the government properly invoked the equitable jurisdiction of the district court for injunctive purposes. In these circumstances, the court was empowered to award monetary penalties as an adjunct to equitable relief to provide a complete remedy.

It is true, as this Court explained in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), that when independent legal and equitable claims are joined in a single suit, the legal claim must ordinarily be tried first to preserve the right to trial by jury on that claim; if the equitable claim is first resolved by a judge, a subsequent trial of related issues before a jury would be barred by collateral estoppel. But this doctrine has no application in a case—such as this one—that involves only a *single* cause of action seeking both equitable and (arguably) legal relief. Indeed, since rendering the decision in *Beacon Theatres*, the Court has expressly reaffirmed the proposition that a court sitting in equity may award legal relief when necessary to provide a complete remedy. *Katchen* v. *Landy*, 382 U.S. 323, 339-340 (1966). In any event, even if the *Beacon Theatres* doctrine otherwise had relevance here, the Court, as

a prudential matter, properly should decline to apply it to avoid "dismember[ing] a scheme which Congress has prescribed." *Katchen*, 382 U.S. at 339.

ARGUMENT

THE SEVENTH AMENDMENT DOES NOT CONFER A RIGHT TO A JURY TRIAL IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." As this Court repeatedly has explained, "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity * * * in which jury trial was not." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449 (1977). "The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935). See generally *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 333 (1979); *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974); *Ross* v. *Bernhard*, 396 U.S. 531, 538 n.10 (1970); *Simler* v. *Conner*, 372 U.S. 221, 223 (1963); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 470-471 (1962); *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 445-448 (1830).

Under the Court's historical approach, a party is entitled to trial by jury only if he establishes that the "rights and remedies" at issue are of the sort that traditionally were tried to a jury in courts of law. *Pernell* v. *Southall Realty*, 416 U.S. at 381.

This inquiry focuses on the practice in 1791, at the time of the adoption of the Amendment. See *Parklane Hosiery Co.*, 439 U.S. at 333; *Dimick* v. *Schiedt*, 293 U.S. 474, 496 (1935); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 642 & n.8 (1973). And, as Justice Story explained in one of the earliest interpretations of the Amendment, the jury trial inquiry is concerned principally with "the common law of England, the grand reservoir of all our jurisprudence." *United States* v. *Wonson*, 28 F. Cas. 745, 750 (D. Mass. 1812) (No. 16,750). See *Pernell*, 416 U.S. at 371-374, 376-379; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 8 (1899); Wolfram, *supra*, 57 Minn. L. Rev. at 641.

When, as in this case, the rights and remedies involved are created by a statute enacted after the adoption of the Seventh Amendment, jury trial is available if the statutory action "serves the same essential function" as an action triable to a jury at common law. *Pernell*, 416 U.S. at 375. Determining whether the statutory action does so requires "fitting the [modern] cause into its nearest historical analogy." *Ross*, 396 U.S. at 543 n.1 (Stewart, J., dissenting). Cf. *Curtis*, 415 U.S. at 194.[9]

While petitioner focuses his historical inquiry almost entirely on the remedy sought by the govern-

[9] Amicus Washington Legal Foundation ignores this historical test when it argues (Br. 9) that, even where it could constitutionally be withheld, the jury trial right "cannot be denied unless expressly negated [by Congress]." Indeed, amicus's view would sweepingly expand the reach of the Seventh Amendment in the precise context—congressionally created public rights—where this Court has held that a jury trial is not required. See *Atlas Roofing Co.*, 430 U.S. at 455.

ment in this case (see Pet. Br. 18-25), under this Court's analysis a jury trial is constitutionally guaranteed only if both the remedy *and* the cause of action were treated as legal by the English courts in 1791. If either the right *or* the remedy had been viewed as equitable in nature in 1791, Chancery would have taken jurisdiction and a jury trial would have been unavailable. Because the remedial powers of law courts were strictly limited, parties were forced to seek the assistance of courts of equity—and thus to forgo a jury trial—when they attempted to vindicate legal rights with equitable remedies.[10] See 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 127, at 169; § 139, at 191-192 (5th ed. 1941); G. Keeton, *An Introduction to Equity* 237 (6th ed. 1965); Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 Mich. L. Rev. 1571, 1572-1573 (1983) (citing J. Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* (Dublin 2d ed. 1789) (London 1st ed. 1780)); Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 Harv. L. Rev. 737, 741, 753-754 n.127 (1983). Similarly, the rigidity of the common law courts made

[10] This is illustrated in a modern context by the unavailability of a jury trial in employment discrimination actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* While the substantive right to be free from discrimination gives rise to an action at law (see *Curtis*, 415 U.S. at 195-196 n.10), the backpay remedy provided by Title VII is equitable. See *Setser* v. *Novack Inv. Co.*, 638 F.2d 1137, 1141 (citing cases), modified on other grounds, 657 F.2d 962 (8th Cir.), cert. denied, 454 U.S. 1064 (1981). The equitable nature of the remedy makes the Seventh Amendment guarantee inapplicable. See generally *Curtis*, 415 U.S. at 197; Note, *supra*, 96 Harv. L. Rev. at 747-748 & n.80.

it impossible for them to entertain equitable causes of action, even when the litigant sought a legal remedy. See generally 1 J. Pomeroy, *supra*, § 108, at 139; 4 *id.* § 1420, at 1076; Note, *supra*, 96 Harv. L. Rev. at 748.[11] In this case, petitioner cannot prevail because both the cause of action pursued by the United States and the remedy awarded by the court are equitable.[12]

A. The Cause Of Action Created By The Clean Water Act Is Equitable In Nature

1. At the outset, the right to a jury trial is inapplicable here because the cause of action created by the Clean Water Act is essentially equitable in nature. While the permit and regulatory apparatus created by the CWA was of course unknown at com-

[11] The Court has declined to decide whether the Seventh Amendment has any "application to Government litigation and leaves solely to the Sixth Amendment the function of interposing a jury between the Federal Government and an individual from whom it wishes to exact a fine." *Atlas Roofing Co.*, 430 U.S. at 450 n.6. Because, as we explain below, the Seventh Amendment is inapplicable here under the traditional historical test, this case likewise does not require the Court to resolve that question.

[12] Correspondingly, petitioner would not have been entitled to a jury trial had he sought and been denied a permit to conduct filling activities. In those circumstances, his claim initially would have been assessed by the Corps, with judicial review in the district court based on the administrative record (see page 6, *supra*). Where a determination of public rights—such as those involved under the Clean Water Act and Rivers and Harbors Act (cf. *California* v. *Sierra Club*, 451 U.S. 287, 295 (1981); *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 19)—is committed to an administrative agency, the Seventh Amendment's guarantees are inapplicable. See *Atlas Roofing Co.*, 430 U.S. at 455, 458-459.

mon law, by far the closest historical analogue to an action under the CWA was one to cure a "public" or "common" nuisance. "Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires." 4 W. Blackstone, *Commentaries on the Laws of England* 167 (T. Green ed. 1979) (1st ed. 1769). See 1 W. Hawkins, *A Treatise on the Pleas of the Crown* 197 (1724). As an annoyance to the "whole community in general," common nuisances were a cause of action available only to the Attorney General or the Crown, and could not be brought by private plaintiffs. 4 W. Blackstone, *supra*, at 167.

Two species of common nuisance actions that were well-developed in 1791 are directly analogous to suits brought under present-day environmental regulations. The sovereign could bring a claim for a so-called "purpresture" to enjoin, fine, or order the repair of an enclosure or obstruction of public waters or rivers; alternatively, the sovereign could enjoin or fine "offensive trades and manufactures" that polluted the environment. 4 W. Blackstone, *supra*, at 167.[13] Compare *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 314 n.7 (1982) ("The objective of this [Clean Water Act] statute is in some respects similar to that

[13] Indeed, the particular form of nuisance most directly analogous to the filling of wetlands alleged in the instant case —the diverting of public watercourses or raising or lowering of a pond—was one of the earliest forms of nuisance recognized in medieval law. See McRae, *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27, 37 & nn.62, 64 (1948) (citing cases).

sought in nuisance suits"). Cf. *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (the federal common law of nuisance in the water pollution area is preempted by the CWA).

2. Both species of common nuisances fell clearly within the jurisdiction of the courts of equity. Almost 100 years ago, this Court endorsed Justice Story's observation that " '[in] regard to public nuisances,' * * * 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property.' " *Mugler* v. *Kansas*, 123 U.S. 623, 672-673 (1887) (citations omitted). Accord, *United Steelworkers of America* v. *United States*, 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring) (citing *Bond's Case*, Moore 238 (1587); *Jacob Hall's Case*, 1 Ventris 169, 1 Mod. 76 (1671); *The King* v. *Betterton*, 5 Mod. 142 (1696); *Baines* v. *Baker*, 3 Atk. 750, 1 Amb. 158 (1752); and *Mayor of London* v. *Bolt*, 5 Ves. 129 (1799)). "This old, settled law was summarized in 1836 by the Lord Chancellor in the statement that * * * 'a court of equity has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbours and public roads; and, in short, generally, to prevent public nuisances.' *Attorney-General* v. *Forbes*, 2 M. & C. 123, 133." *Steelworkers*, 361 U.S. at 60 (Frankfurter, J., concurring). See *Mugler*, 123 U.S. at 673.[14]

[14] See, *e.g.*, *Bond's Case*, *supra* (enjoining operation of a pigeonhouse causing a public nuisance); *Attorney General* v. *Richards*, 2 Anst. 603, 1 Ames Eq. Jur. 615 (1795) (enjoining the filling of shoreline and erection of key and docks, and ordering restoration of harbor to prior status); *Attorney General* v. *Hunter*, 1 Dev. Eq. (N.C.) 12, 1 Ames Eq. Jur. 621 (1826) (damming of mill-pond caused "exhalations" that were unhealthy); J. Pomeroy, *A Treatise on Equity Jurisprudence* 830 (1907) (citing cases); W. Walsh, *A Treatise on Equity* 198 (1930) ("There is no question about the ending of purprestures by negative or mandatory injunction as the case may require"). See also *Robinson* v. *Byron (Lord)*, 1 Bro. C.C. 588, 1 Ames Eq. Jur. 566 (1785) (equity court ordered injunction against obstruction of public waters); *Bush* v. *Western*, Prec. Ch. 530, 1 Ames Eq. Jur. 553 (1720) (equity court granted injunction in private suit arising out of obstruction of watercourse).

The foundation of equity jurisdiction in this category of cases was the probability that public nuisances would cause irreparable injury that could not be remedied adequately with pecuniary compensation, and that they would lead to a multiplicity of suits at law by injured parties. See 1 H. Ballow, *A Treatise of Equity* 3 n.* (1835). Because public nuisances were inherently of a continuing or recurring nature and affected large numbers of people, refusing equity jurisdiction would have made it necessary for many private plaintiffs to bring repeated suits for damages, the only course of action available in a court of law. Furthermore, even a host of individual damage actions could not have fully vindicated the continuing, unquantifiable interest of the public at large in, for example, the maintenance of a harbor unobstructed by illegal filling. In those circumstances, courts of law were seen as wholly inadequate to vindicate the public rights implicated in common nuisance actions, in accord with the principle that equity would intervene to protect from common nuisances. W. Walsh,

A Treatise on Equity 199-200 (1930). See *Mugler*, 123 U.S. at 672-673.

3. As the preceding discussion makes clear, public nuisance actions were understood to be equitable in nature at the time of the adoption of the Seventh Amendment. Indeed, in 1795—almost contemporaneously with the ratification of the Amendment in the United States—the English Attorney General, on behalf of the Crown, brought a nuisance suit in Chancery on facts remarkably similar to those giving rise to this action. *Attorney General* v. *Richards*, 2 Anst. 603, 1 Ames Eq. Jur. 615 (1795). The Attorney General alleged that the defendants had filled shoreline and built docks and buildings between the high and low water marks in a harbor, thus threatening "damage to the harbour, by preventing the free current of the water to carry off the mud" (1 Ames Eq. Jur. at 615). The Attorney General sought to enjoin further filling or building, and the restoration of the harbor "to its ancient situation" (*ibid.*).

The Chancellor unequivocally held that "where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it." 1 Ames Eq. Jur. at 617. Although there were disputed factual issues—the defendant claimed to hold the filled waterfront under letters-patent that permitted his activities (see *id.* at 615)—the Chancellor in *Richards* expressly affirmed his authority to decide the case without a jury (*id.* at 617). Indeed, the English equity courts continued during the ensuing decades to enjoin purprestures in public waterways. See, *e.g.*, *Attorney General* v. *Parmeter*, 10 Price 378 (1811), aff'd by the House of Lords, 10 Price 412 (1812) (enjoining obstruction of Portsmouth Harbor); *Attorney General* v. *Johnson*, 2 Wils. Ch. 87 (1819) (enjoining obstruction of the Thames River).[15]

Given the English precedents, it is not surprising that recognition of the power of equity courts to enjoin or fine public nuisances has been a "commonplace of jurisdiction in American judicial history." *Steelworkers*, 361 U.S. at 61 (Frankfurter, J., concurring).[16] Indeed, Congress specifically provided that suits to enforce the original predecessor to the CWA, the Rivers and Harbors Appropriations Act of 1890—the first federal statute aimed at preventing the

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[15] Although the Chancellor in equity could at his discretion "issue" or impanel advisory juries or commissions of lawyers "to inform the conscience of the court," *Parsons* v. *Bedford*, 28 U.S. at 446 (see, *e.g.*, *Bullen* v. *Michel*, 2 Price 399, 488-489 (1816); *O'Connor* v. *Cook*, 6 Ves. Jun. 665, 667, 671 (1802), aff'd on this ground, 8 Ves. Jun. 536 (1803); *Attorney General* v. *Philpott*, 8 Ch. 1 (cited in *Attorney General* v. *Richards*, 1 Ames. Eq. Jur. at 616 ("commission" appointed to determine existence of a purpresture)), this was not the equivalent of a common law jury whose fact finding could be set aside only as against the law or the evidence. See *Capital Traction Co.* v. *Hof*, 174 U.S. at 39; A. Sutherland, *Notes on the Constitution* 669-670 (1904); *Attorney General* v. *Hunter*, 1 Ames. Eq. Jur. 621 (1826); *Bullen* v. *Michel*, 2 Price at 319; *Adley* v. *The Whitstable Co.*, 17 Ves. Jun. Supp. 478 (1815) (reserving to equity court the ultimate determination of matters sent to advisory jury).

[16] See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, 237 U.S. 474 (1915) (air pollution from copper smelter); *Arizona Copper Co.* v. *Gillespie*, 230 U.S. 46 (1913) (steam pollution); *In re Debs*, 158 U.S. 564 (1895); *Mugler* v. *Kansas*, *supra*; *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Georgetown* v. *Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98 (1838); *Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239, 244 (1870); *Board of Health* v. *Vink*, 184 Mich. 688, 151 N.W. 672 (1915); *Village of Pine City* v. *Munch*, 42 Minn. 342, 344, 44 N.W. 197-198 (1890).

filling or obstruction of the Nation's waterways—should be brought in courts of equity (26 Stat. 454). And this Court has expressly held that the Seventh Amendment has no application in public nuisance suits. In *Mugler* v. *Kansas*, *supra*, an action involving a statute prohibiting the manufacture and sale of intoxicating liquors without a permit, the Court noted the "salutary jurisdiction" of an equity court to hear public nuisance cases (123 U.S. at 673). In response to the claim that a trial by jury nevertheless was necessary, the Court held that "it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance" (*ibid.*).

In sum, the closest historical analogue to the cause of action here, common nuisance in general and purpresture in particular, was incontrovertibly available in equity.[17] Under the first prong of the Seventh Amendment test, petitioner accordingly cannot claim a right to a jury trial.

B. The Remedy Created By The Clean Water Act Is Equitable

While the equitable nature of the Clean Water Act cause of action is enough to dispose of petitioner's claim, that claim also is foreclosed by the second prong of the Seventh Amendment's historical test:

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[17] While these public nuisance cases brought in equity generally sought injunctive relief without civil penalties, the cases establish that the cause of action of public nuisance was available in equity courts, thus satisfying the first prong of the historical test. In contrast to this large body of English and American law, we have found no instances in the years preceding or contemporaneous with the passage of the Seventh Amendment in which a law court entertained a public nuisance cause of action brought by the sovereign.

the *remedy* available under the Act is equitable in nature. Petitioner evidently acknowledges (Pet. Br. 27) that the injunctive relief sought by the government was equitable, but insists that the civil penalty awarded by the court amounted to legal relief. In fact, however, the civil penalty at issue here, which was awarded at the district court's discretion and which was designed in large part to force petitioner to disgorge his improper profits, is of the sort traditionally viewed as equitable. Congress authorized the award of such penalties, moreover, as part of a package of remedies designed to afford complete relief against violators of the CWA—that is, as part of the sort of comprehensive package of remedies traditionally awarded by courts of equity.

1. The civil penalties made available under the Clean Water Act are not a fixed sum certain equivalent to the amount sought in a common law action for debt. To the contrary, those penalties are set at the discretion of the court, after the weighing of an array of equitable factors.[18]

The discretionary nature of the civil penalty remedy is first made clear by the factors that shape a CWA case even before it reaches district court. The legislative history of the 1972 and 1977 Clean Water Act amendments shows that Congress intended to give the United States broad discretion regarding when to bring an action and how to frame the request for relief. See 1 CRS, Library of Congress, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at

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[18] Amicus U.S. Chamber of Commerce's attempt to characterize Clean Water Act civil penalties as punitive damages (see Br. 8) cannot be reconciled with this Court's holding that punitive damages are not available under the Act. Cf. *Middlesex County Sewerage Authority*, 453 U.S. at 16-17.

174 (Comm. Print 1973) [hereinafter cited as *Leg. Hist.*]; 1 *Leg. Hist.* 315; see also 2 *Leg. Hist.* 1482; *id.* at 1235 (comments of Rep. Terry). In 1972, Congress made it clear that civil penalties and injunctive relief could be sought concurrently and interchangeably in any case, at the government's discretion. 1 *Leg. Hist.* 802. In doing so, it adopted the Administration's suggestion that "Section 309(b), (c) and (d) should be made to conform to each other as much as possible to avoid any unintended distinctions being drawn between violations subject to injunctive relief, criminal and civil penalties." 1 *Leg. Hist.* 848.

This flexibility of remedies was continued in the 1977 amendments to Section 309, which extended the provision's coverage over industrial discharges of pollutants. As Congress emphasized, "[t]hese remedies are all at the discretion of the Administrator. No discharger has any right to compel the Administrator to provide a particular remedy. These remedies are in addition to and not exclusive of existing remedies." 3 CRS, Library of Congress, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act* 464 (Comm. Print 1978).

Once a violation is adjudicated, Congress envisioned that the courts also would perform highly discretionary calculations in awarding civil penalties.[19] When it enacted the 1977 amendments, Congress ex-

[19] In this respect, the Clean Water Act is similar to other environmental protection statutes, which leave the amount of civil penalties to the judge's discretion. See, *e.g.*, Clean Air Act, 42 U.S.C. 7413(b); Resource Conservation and Recovery Act, 42 U.S.C. 6928(g); Safe Drinking Water Act, 42 U.S.C. 300g-3(c).

pressly endorsed EPA's then-existing penalty calculation policy (see 123 Cong. Rec. 39190 (1977) (remarks of Sen. Muskie)),[20] which remains substantially the same today.[21] In setting a penalty, this policy—which was developed to guide EPA negotiators in reaching settlements with violators of the CWA—looked first to the economic benefit that the violator obtained from failing to comply with the CWA. From there, the final penalty would be determined by using a range of discretionary considerations to modify the amount of the improper benefit: the environmental impact of the violation; the effect of the violation on the regulatory system; the state of mind of the violator; the violator's history of compliance with the CWA; and the violator's ability to pay. See Letter from Jeffrey G. Miller and Marvin B. Durning, EPA Assistant Administrator for Enforcement, to Sen. Edmund S. Muskie (Dec. 14, 1977), *reprinted in* 123 Cong. Rec. 39190 (1977); Memorandum from Stanley W. Legro to EPA Regional Administrators (June 3, 1977), *reprinted in* 123

[20] Congress had a detailed knowledge of EPA's existing penalty policy (see Letter from Jeffrey G. Miller and Marvin B. Durning, EPA Assistant Administrator for Enforcement, to Sen. Edmund S. Muskie (Dec. 14, 1977), *reprinted in* 123 Cong. Rec. 39190 (1977)); even in the absence of an express statement to that effect, Congress accordingly should be presumed to have endorsed the Agency's approach. See generally *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

[21] Courts interpreting the Clean Water Act have looked to the EPA Penalty Policy in setting the amount of civil penalties. See, *e.g.*, *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1556-1557 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), petition for cert. pending, No. 86-473; *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1201 (D.N.J. 1985). See also *United States* v. *Akers*, 785 F.2d 814, 823 (9th Cir. 1986), cert. denied, No. 85-2130 (Oct. 6, 1986).

Cong. Rec. 39191 (1977). See generally *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1557 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), petition for cert. pending, No. 86-473; *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1201 (D.N.J. 1985).

As the court of appeals explained, the discretion that infuses a court's choice of a given money penalty also is made manifest by the role of civil penalties as part of a package of equitable relief that may be awarded under the Clean Water Act. The "objective of the [CWA] is to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *Romero-Barcelo*, 456 U.S. at 314 (quoting 33 U.S.C. 1251(a)). This purpose, the Court has noted, "is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies" (456 U.S. at 314 n.7). Not surprisingly, then, the CWA "permits the district court to order that relief it considers necessary to secure prompt compliance with the Act" (*id.* at 320). A court adjudicating a CWA case therefore is free to make use of whatever combination of injunctive relief and civil penalties will most efficaciously and equitably remedy a violation (see *id.* at 314)—"to mould each decree to the necessities of the particular case" (*id.* at 312). See generally W. Rodgers, *Environmental Law* § 4.6, at 404 (1977). That process is well-illustrated here, where the court awarded the larger part of the civil money penalties to induce petitioner to restore the Fowling Gut Extended waterway to its former condition.[22]

[22] Petitioner challenged this penalty before the lower courts (see C.A. Br. 21-22) by asserting that the portion of the government's complaint directed at the filling of Fowling Gut Extended alleged a violation only of the Rivers and Harbors Act, which contains no provision for the assessment of civil penalties. This argument was rejected by both courts below (see Pet. App. 10a n.4; *id.* at 31a (noting that relief for the filling of Fowling Gut was requested under *both* the Rivers and Harbors Act and 33 U.S.C. 1319)), and was not renewed in the petition for certiorari.

This sort of discretionary calculation, turning on a balancing of statutory, policy, technical, and particularized equitable factors, historically would have been performed by a court sitting in equity. Thus, where the court retains "substantial discretion" about the amount of money to award,[23] "the nature of the jurisdiction which the court exercises is equitable, and under [this Court's] cases neither party may demand a jury trial." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring). See *Curtis*, 415 U.S. at 197; *Troy* v. *City of Hampton*, 756 F.2d 1000, 1003 (4th Cir. 1985), cert. denied, No. 84-1898 (Oct. 7, 1985); D. Dobbs, *Handbook on the Law of Remedies* § 2.1, at 28 (1973); H. McClintock, *Handbook of the Principles of Equity* 96 (1948); Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524, 533 (1982); Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 Envtl. L. 477, 480 (1979). See also 1 J. Pomeroy, *supra*, § 60, at 77.[24]

[23] Because Section 309(d) provides that a person who violates the CWA "shall be subject to a civil penalty," some penalty, even if only a nominal one, ordinarily is assessed in every case. See *Stoddard* v. *Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208-1209 (4th Cir. 1986).

[24] Accordingly, under other statutes establishing discretionary penalty schemes, the determination of the amount

2. The *nature* of the factors taken into account by the court in setting CWA civil penalties also demonstrates the equitable character of the penalty remedy. As we explain above, under the EPA penalty

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of civil penalties has been committed to the informed discretion of the district judge. See, *e.g.*, *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975) (Federal Trade Commission Act); *United States* v. *Duffy*, 550 F.2d 533, 534 (9th Cir. 1977) (Federal Aviation Act); *United States* v. *Ancorp National Services, Inc.*, 516 F.2d 198, 202 (2d Cir. 1975) (Federal Trade Commission Act); *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 438 n.28 (2d Cir. 1974) (same); *United States* v. *Phelps Dodge Industries, Inc.*, 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984) (same); *Aircrane, Inc.* v. *Butterfield*, 369 F. Supp. 598, 613 (E.D. Pa. 1974) (Federal Aviation Act). Indeed, even where statutes expressly provide for a trial by jury, determination of civil penalties is left to the trial judge. See *FAA* v. *Landy*, 705 F.2d 624, 635 (2d Cir. 1983); *Duffy*, 550 F.2d at 534. See also *J.B. Williams*, 498 F.2d at 438 n.28. Thus, even if petitioner were entitled to a jury trial on the question of liability here, it would remain the province of the district court judge to assess appropriate relief. Petitioner cites no authority for his contrary assertion (Br. 34-35) that the jury should determine the amount of the civil penalty in a CWA proceeding. In fact, in the context of environmental enforcement actions, district judges universally have performed the calculation of civil penalties, often with reference to the recommendation of the EPA Administrator. See, *e.g.*, *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1556-1557 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986) (Clean Water Act), petition for cert. pending, No. 86-473; *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1201 (D.N.J. 1985) (Clean Water Act). See also *State ex rel. Brown* v. *Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 438 N.E.2d 120, 124 (1982). Of course, appellate review is available to assure that a court's exercise of discretion comports with governing legal standards. *Albemarle Paper Co.*, 422 U.S. at 416.

policy endorsed by Congress in 1977, the "starting point"—as well as "the most important single criterion"—in setting a penalty is the economic benefit achieved by the polluter because of his noncompliance with the statute. Memorandum from Stanley W. Legro to EPA Regional Administrators (June 3, 1977), *reprinted in* 123 Cong. Rec. 39191 (1977). Under this policy, penalties obtain their deterrent effect by "at least remov[ing] any economic gain achieved by non-compliance." Letter from Jeffrey G. Miller and Marvin B. Durning, EPA Assistant Administrator for Enforcement, to Sen. Edmund S. Muskie (Dec. 14, 1977), *reprinted in* 123 Cong. Rec. 39190 (1977). Thus Senator Muskie, Conference Committee chairman and chief co-sponsor of the 1977 Clean Water Act amendments, emphasized that "the [EPA's] current enforcement policy is to seek court imposed penalties for noncompliance with Clean Water Act requirements in amounts commensurate with the economic benefit of delayed compliance, among other factors. This policy embodies congressional intent on the criteria that should be considered by courts in imposing civil penalties under existing provisions of the act." 123 Cong. Rec. 39190 (1977) (remarks of Sen. Muskie).

In their calculation and effect, Clean Water Act civil money penalties therefore are closely analogous to the classic equitable remedy of disgorgement.[25] There is a "seeming unanimity of judicial thinking"

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[25] Petitioner conceded at trial (Tr. 2104) that he profited from the sale of the lots created by his fill activity. He testified that, if allowed to continue to fill his lots at Mire Pond, his profit from the sale of each lot there would be $2,130 (*id.* at 3336). A lot at his Eel Creek property would bring him a profit of approximately $13,000 (*id.* at 3341).

that such non-damages remedies are equitable in nature. *Setser* v. *Novack Inv. Co.*, 638 F.2d 1137, 1141 (8th Cir.), modified on other grounds, 657 F.2d 962, cert. denied, 454 U.S. 1064 (1981). And the Court repeatedly has made clear that restitution and disgorgement are "integral part[s] of an equitable remedy" (*Curtis*, 415 U.S. at 197) that "differs greatly from * * * damages and penalties." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946). See *Albemarle Paper Co.*, 422 U.S. at 416-418; *Pierce* v. *Vision Investments, Inc.*, 779 F.2d 302, 308-309 (5th Cir. 1986) (disgorgement and restitution in vindication of a public right is "clearly equitable" in nature); *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95-96 (2d Cir. 1978) (in SEC disgorgement action court "exercis[es] the chancellor's discretion to prevent unjust enrichment"); *Arber* v. *Essex Wire Corp.*, 490 F.2d 414, 420 (6th Cir.), cert. denied, 419 U.S. 830 (1974); cf. *United States* v. *Georgeoff*, 22 Env't Rep. Cas. (BNA) 1601, 1602 (1984). For this reason as well, civil penalties of the sort authorized by the Clean Water Act historically would have been awarded by an equity court, rather than a court of law.

3. Petitioner disregards these considerations in arguing that *all* actions to collect statutorily-created penalties are legal in nature. This contention simply fails to take account of the different types of money judgments rendered by the courts.[26] It undoubtedly is true that " 'where an action is simply for the recovery and possession of specific real or personal prop-

[26] In any event, as we explain above, the equitable nature of the cause of action here would defeat petitioner's claim for a jury trial even if the CWA's civil penalty remedy were characterized as legal.

erty, or for the recovery of a money judgment, the action is one at law.' " *Pernell*, 416 U.S. at 370 (quoting *Whitehead* v. *Shattuck*, 138 U.S. 146, 151 (1891)). At the same time, however, the Court has flatly rejected the proposition that "any award of monetary relief must necessarily be 'legal' relief." *Curtis*, 415 U.S. at 196. See *Katchen*, 382 U.S. at 336; D. Dobbs, *supra*, § 4.1, at 222-223. Nor is every pecuniary remedy created by statute "legal" within the meaning of the Seventh Amendment; the backpay awarded under Title VII, to give just one familiar example, is equitable in nature. See page 17 note 10, *supra*. In fact, petitioner's simplistic assertion rests on a basic misreading of the cases.[27]

[27] Although petitioner claims that civil penalties are closely analogous to "amercements" (Br. 19 & n.7), amercements in fact were "assessed by the peers of the delinquent, or the affeerors, or imposed arbitrarily at the discretion of the court or the lord." *Black's Law Dictionary* 107 (4th ed. 1968). Because a judge was empowered to assess the amercement *without* the aid of a jury, the practice associated with the levying of amercements provides no support for petitioner. Furthermore, although petitioner discusses amercements as they existed at the time of the Magna Carta in 1215 (Br. 19), it is clear that over the following 500 years amercements underwent a radical transformation. Specifically, amercements in postmedieval times involved fines imposed by the judge—without the assistance of a jury—on sheriffs or officers of the court for failure to perform their official duties. See *Sherman* v. *Upton, Inc.*, 242 N.W. 2d 666, 667 (S.D. 1976); *Rodgers* v. *Waters*, 2 Ala. 644 (1841); *Dawson* v. *Holcomb*, 1 Ohio 135 (1824); *Stansbury* v. *Patent Cloth Manufacturing Co.*, 5 N.J.L. 433 (1819). These specialized fines, imposed on officers of the court, hardly can be considered a close analogue to the civil penalties assessed against violators of the Clean Water Act.

It is established that actual and punitive damages are "the traditional form[s] of relief offered in the courts of law" (*Curtis*, 415 U.S. at 196 (footnote omitted)), along with money remedies in "action[s] on a debt allegedly due under a contract." *Dairy Queen*, 369 U.S. at 477. The courts accordingly have suggested that an action to collect a statutory penalty is analogous to a legal action for debt when—as in a contract action—the suit is for " 'a sum certain * * * due to the plaintiff, or a sum which can readily be reduced to a certainty.' " *United States* v. *Regan*, 232 U.S. 37, 41 (1914) (quoting *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 542 (1871)). See *Hepner* v. *United States*, 213 U.S. 103, 106 (1909). Virtually all of the decisions relied upon by petitioner for the proposition that statutory penalty actions should be tried to a jury (see Br. 19-24) accordingly involved attempts to collect fixed penalties of that sort; the amounts of the penalties in those cases were certain, either because they were statutorily set or because they were readily calculable from a fixed formula.[28] For example, the dictum in *Regan* and

[28] See *Calcraft* v. *Gibbs*, 5 Term. Rep. 19 (1792), in subsequent proceedings from 4 Term. Rep. 681 (1792) (fixed penalty under the statute of Anne); *United States* v. *Mundell*, 27 F. Cas. 23 (D. Va. 1795) (No. 15,834) (cited by petitioner as *United States* v. *Mulvaney*, Pet. Br. 20) (seeking fixed amounts); *United States* v. *Allen*, 24 F. Cas. 772 (D. Conn. 1810) (No. 14,431) (statute set penalties and forfeitures at multiple of the value of smuggled goods); *Jacob* v. *United States*, 13 F. Cas. 267 (E.D. Va. 1821) (No. 7,157) (imposing $500 penalty for each offense of repossessing stills from government revenue collector); *United States* v. *Bougher*, 24 F. Cas. 1205 (D. Ohio 1854) (No. 14,627) (failure to obtain license for operation of steamboat triggers penalty of $100 for each offense); *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 542-543 (1871) (statute imposes penalty for double the value of the goods illegally received under anti-smuggling statute); *Lees* v. *United States*, 150 U.S. 476, 478 (1893) (statutorily fixed penalty of $1,000). Petitioner also cites (Br. 22) two cases in which the Court evidently concluded that the statutory penalty was criminal in nature. *United States* v. *Zucker*, 161 U.S. 475 (1896); *Chaffee* v. *United States*, 85 U.S. (18 Wall.) 516, 536-537 (1873). Such decisions, of course, cannot control the interpretation of Seventh Amendment jury trial rights. See *Atlas Roofing Co.*, 430 U.S. at 460 n.15. In any event, the statutory penalty was set in those cases at the value of smuggled goods. See *Chaffee*, 85 U.S. (18 Wall.) at 538 ("The action of debt lies for a statutory penalty, because the sum demanded is certain").

The only case cited by petitioner that required a jury trial when the penalty involved a discretionary determination was *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), where a divided panel of the Second Circuit found a jury necessary in an action for civil penalties under Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*). But that decision relied in substantial part on congressional intent (see 498 F.2d at 425-427), and, in particular, made no other response to the government's argument that the Seventh Amendment is inapplicable when the civil penalty is left to the court's discretion (see *id.* at 427 n.15).

Hepner about the availability of a jury trial in statutory penalty actions,[29] upon which petitioner principally relies (see Pet. Br. 23-24), involved attempts to collect a penalty fixed by statute at $1000. See *Regan*, 232 U.S. at 47; *Hepner*, 213 U.S. at 104-105.[30]

[29] The Court subsequently has characterized that language of *Regan* and *Hepner* as dictum (see *Atlas Roofing Co.*, 430 U.S. at 449), and expressly has declined "to decide whether the dictum in these cases correctly divines the intent of the Seventh Amendment" (*id.* at 449 n.6).

[30] Indeed, the statute at issue in *Hepner* specifically provided that suits for the statutory penalty would proceed " 'as debts of like amount are now recovered in the courts of the United States' " (213 U.S. at 105 (quoting Act of Mar. 3, 1903, ch. 1012, § 5, 32 Stat. 1215)).

However analogous a penalty of that sort may be to a debt at law, penalties assessed under the Clean Water Act fundamentally differ from statutorily-fixed sums. Because, as we explain above, the amount of a CWA penalty turns on an exercise of the judge's discretion—and thus involves an assessment of the seriousness of the offense, the efficacy of other forms of relief, and the like—it plainly is neither a "sum certain" nor "a sum which can readily be reduced to a certainty." Indeed, to the extent that CWA money penalties have an objectively-calculable component, it is measured by the violator's profit. And that amount, as we have explained, is equivalent to "equitable" disgorgement rather than to "legal" debt.

C. A Jury Trial Is Not Required Even If The Civil Penalty Component Of A Clean Water Act Judgment Is Thought To Be Legal In Nature

1. Finally, even if the civil penalties here somehow were deemed legal in nature, petitioner still would not be entitled to a jury trial. It has long been settled that where "the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to * * * award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399. See *Atlas Roofing Co.*, 430 U.S. at 453 n.10; *Curtis*, 415 U.S. at 196; *Katchen*, 382 U.S. at 338. The availability of legal relief as an incident to an equitable judgment is rooted in a long tradition, in both the public nuisance and other contexts. See generally 5 J. Pomeroy, *Equity Jurisprudence and Equitable Remedies* § 536, at 920 (1905) ("in addition to an injunction, damages for the past nuisance will be awarded" when necessary to provide complete relief). And as the Court has noted,

"[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell* v. *DeMario Jewelry Co.*, 361 U.S. 288, 291-292 (1960). See *Brown* v. *Swann*, 35 U.S. (10 Pet.) 497, 503 (1836). Where the public interest is directly implicated by the operation of a regulatory statute, the power to provide complete relief " 'assume[s] an even broader and more flexible character than when only a private controversy is at stake.' " *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398).

That the award of such complete relief "is within the recognized power and within the highest tradition of a court of equity" (*Porter*, 328 U.S. at 402) repeatedly has been acknowledged in the specific context of public nuisances resulting from water pollution. See *Missouri* v. *Illinois & Chicago District*, 180 U.S. 208, 244 (1901) (citation omitted) (resort to equity justified since court of law " 'could not remedy the whole mischief' " and equity could provide " 'a more efficacious and complete remedy' "). See also *Mugler*, 123 U.S. at 673 (collecting cases on public nuisances). And in other regulatory contexts, the Court has held that an equity court may compel the disgorgement of profits acquired in violation of statutory restrictions—even if such relief would have been available in a court of law. *Porter*, 328 U.S. at 398-399.

Here, the government plainly did invoke the equitable jurisdiction of the court for injunctive purposes. Like all suits under the CWA, this action ultimately was brought to "restore and maintain the * * * integrity of the Nation's waters." As we explain above

(at 19-22), jurisdiction historically lay in courts of equity to entertain such actions. And notwithstanding petitioner's assertion to the contrary (see Pet. Br. 16), at trial the government presented a comprehensive restoration plan addressing all of the filled properties (see Tr. 2220-2227).[31] In these circumstances, the district court was empowered to include a monetary award as an adjunct to equitable relief in an effort to provide a complete remedy.

2. Petitioner nevertheless insists (Br. 25-28) that, if CWA civil penalties are deemed to be "legal" remedies that are awarded as part of a package designed to provide complete relief, their availability must be determined by a jury prior to the award of equitable relief by a judge. Petitioner relies on the doctrine of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood, supra.* That doctrine, however, is inapposite here: it was developed as a response to problems that arose when distinct legal and equitable claims were litigated together.

[31] The plan was designed to yield maximum environmental benefits through use of restoration and mitigation, while at the same time avoiding any adverse effect on innocent third-party purchasers (Tr. 2221). For the Eel Creek and Mire Pond II sites, which had not yet been developed, the government proposed excavation of the filled areas down to the original elevation so that the wetlands would reestablish themselves (*ibid.*). For the violations at the Ocean Breezes sites, where development had occurred, the government proposed extensive mitigation in an adjacent area, including excavation, elimination of obstructions to tidal waterways, creation of a bridge-like structure spanning a waterway, removal of fill, cutting of a connection to an isolated pocket of marsh, and creation of a new tidal connection for the unlawfully filled 40-foot-wide waterway, Fowling Gut Extended. Petitioner presented no restoration plan of his own at trial. Thus, the government had formulated, presented at trial, and sought to have implemented a plan calling for substantial injunctive relief.

Prior to the merger of law and equity in 1938, when a case presented both legal and equitable claims the equitable claim could be tried first—even though the decision of the judge on issues raised in the equitable claim would collaterally estop the litigation of common issues raised in a subsequent legal action. See, *e.g.*, *Liberty Oil Co.* v. *Condon National Bank*, 260 U.S. 235 (1922). In 1959, however, this Court held in *Beacon Theatres* that when a prospective antitrust defendant sought a declaratory judgment to establish its innocence, and the prospective plaintiff counterclaimed for treble damages under the Clayton Act, 15 U.S.C. 15, the legal claim for treble damages would have to be tried first to preserve the right to trial by jury on that claim. 359 U.S. at 510-511. This Court reaffirmed *Beacon Theatres* three years later in *Dairy Queen*, where it explained that "legal claims involved in [an] action must be determined prior to any final court determination of * * * equitable claims." 369 U.S. at 479 (footnote omitted). See also *Ross*, 396 U.S. at 537-538. Under both decisions, however, the district judge retained a limited discretion to decline to order a jury trial before the bench trial of common issues. See 359 U.S. at 510.

As this Court has explained, these decisions were premised on the proposition that, when a case encompasses two causes of action, one legal and one equitable, the trial of any common issues before a judge sitting in equity would collaterally estop a subsequent trial of those issues before a jury hearing the legal claim. "Recognition that an equitable determination could have collateral-estoppel effect in a subsequent

legal action was the major premise of * * * *Beacon Theatres, Inc.* v. *Westover.*" *Parklane Hosiery Co.*, 439 U.S. at 333. See *Beacon Theatres*, 359 U.S. at 504. Thus, neither *Dairy Queen* nor *Beacon Theatres* purported to control the situation where only a *single* cause of action had been brought, but where both equitable and arguably legal *relief* was available. See Stumpff, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment*, 83 Mich. L. Rev. 1950, 1969 n.144 (1985).[32] Indeed, since rendering the decision in *Beacon Theatres*, the Court has expressly reaffirmed the proposition that a court sitting in equity may award legal relief when necessary to provide a complete remedy. See *Katchen*, 382 U.S. at 339-340; *Mitchell*, 361 U.S. at 291-292.[33]

In the instant case, there is but a single cause of action under the Clean Water Act[34]—premised on

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[32] Similarly, this Court's decision in *Scott* v. *Neely*, 140 U.S. 106 (1891), upon which *Dairy Queen* was in part premised, held that an equity court lacked jurisdiction where " 'a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.' " *Dairy Queen*, 369 U.S. at 471 (quoting *Scott*, 140 U.S. at 117).

[33] Amicus Washington Legal Foundation contends (Br. 5) that the district court improperly relied on the "equitable cleanup" doctrine in this case, which it claims was repudiated in *Beacon Theatres*. This argument, however, confuses the cleanup doctrine with the authority of an equity court to award complete relief. The former doctrine goes to the equity court's jurisdiction to decide a legal cause of action or issues common to legal and equitable claims; the latter concerns an equity court's authority to award legal relief solely as an incident to remedying an equitable claim.

[34] The government's second complaint also stated a cause of action under the Rivers and Harbors Act. Because that

the charge that petitioner discharged fill material into navigable waterways without a permit—for which Congress has provided both injunctive relief and civil penalties. See 33 U.S.C. 1319(b) and (d). Because there is only one cause of action, there can be no second claim in this case in which collateral estoppel effects will be felt. See S. Rep. 99-50, 99th Cong., 1st Sess. 26 (1986) (specifying, in reauthorization of the Clean Water Act, that "if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed"). Thus, the doctrine of *Beacon Theatres* and *Dairy Queen* is inapplicable here.[35] As a result, in an essentially equitable Clean Water Act action, a court need not empanel a jury

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claim sought only injunctive relief (see J.A. 60)—indeed, the Rivers and Harbors Act does not specifically provide for civil penalties—there is no contention here that it was anything but equitable.

[35] Petitioner's suggestion (Pet. Br. 28-30) that the Clean Water Act creates two distinct causes of action finds no support in the plain language of the statute. Section 309(d), the provision allowing for civil penalties, merely states that a violator shall be subject to a civil penalty not to exceed $10,000 per day. 33 U.S.C. 1319(d). Standing alone, this provision supplies no cause of action. Section 309(d) only has meaning if it is incorporated into Section 309(b) (or into Section 505(a), 33 U.S.C. 1365(a), which authorizes certain citizen suits to enforce the CWA), which authorizes the EPA Administrator actually to "commence a civil action for appropriate relief, including a permanent or temporary injunction * * *" (33 U.S.C. 1319(b)). In any event, two causes of action can hardly be read into a statute that removes any distinction between the circumstances under which civil penalties and injunctive relief may be sought. See *Romero-Barcelo*, 456 U.S. at 320 (various forms of relief available interchangeably, subject to the discretion of the district court).

before awarding civil penalties (even if we assume that those penalties are legal in nature) as part of a package designed to provide complete relief against the violator.

In any event, even if the *Beacon Theatres* doctrine had relevance here—and if we again assume that CWA civil penalties are a form of legal relief—as a prudential matter it would be appropriate to decline to apply the doctrine. The Court has made it clear that the requirement that legal claims be tried before equitable ones is no "more than a general prudential rule." *Parklane Hosiery Co.*, 439 U.S. at 334. "Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." *Katchen*, 382 U.S. at 339-340. This case presents such a situation. Requiring a jury trial on the availability of civil penalties prior to a determination of the propriety of equitable relief "is not consistent with the equitable purposes of" the Clean Water Act. *Id.* at 339. Because the court must determine in every CWA case what mix of remedies will provide the most efficacious relief, holding a prior jury trial directed only to civil penalties would "dismember a scheme which Congress has prescribed" (*ibid.*) . These circumstances would thus, in any event, call for a departure from the *Beacon Theatres* approach.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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